IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 10078 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KEYUR BIPINCHANDRA DESAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 10078 of 2003

MR AR GUPTA for Petitioner No. 1-2

MR AD OZA, LD. PUBLIC PROSECUTOR for Respondent No. 1

MR BB NAIK for Respondent No. 2

MR PY DIVYESHVAR with

MS JIRGA D JHAVERI for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 26/03/2004

ORAL JUDGEMENT

The petitioners before this Court are accused Nos. 9 and 10 in the Criminal complaint filed by the respondent No.2 Bank, for the offences punishable under Sections 406, 420, 465, 468, 471 read with 114 of Indian Penal Code. The petitioners pray that invoking jurisdiction of this Court under Section 482 of Code of Criminal Procedure, the proceedings initiated by respondent Bank through its officer Shri Bharatkumar Ambalal Panchal, be quashed as the same is bad and unsustainable on the grounds mentioned in paragraph 5 of the memo of petition.

I have considered the submissions made by learned Advocate Mr. Gupta for the petitioners, Mr.A.D. Oza, Learned Public Prosecutor for the respondent State and Mr. B.B. Naik for the complainant Bank.

It is submitted by Mr. Gupta that they are wrongly dragged into a sensitive litigation, though they were not party to any of the transactions referred to in the complaint filed before the Police. Initially the complaint was filed in the Court of Judicial Magistrate First Class, Anand and thereafter, it has been sent for investigation vide order passed under Section 156(3) of Cr.P.C and at present, undisputedly the Police is investigating the offence. He submitted that about 10 persons are named as accused in the complaint, wherein petitioner No.1 is arraigned as accused No.9 and petitioner No.2 is arraigned as accused No.10. I have considered the complaint filed by Bharatkumar Ambalal Panchal, an officer of the Bank, on 13th November, 2003 before the Judicial Magistrate First Class at Anand, narrating the fraud played with the Bank, which was ultimately registered as M.Case No. 74 of 2003. The crime is registered against the petitioners for the offences punishable under Sections 406, 420, 465, 467, 468, 471 read with 114 of Indian Penal Code. It is contended by the petitioners, stating the facts leading to the complaint in paragraph 2 of the memo of petition, that the FIR in question does not disclose any offence qua present petitioners and the alleged transaction had taken place in the year 1999 and the petitioners have been appointed as Power of Attorney of accused Nos. 2, 3 and 4 for the first time in the year 2003. So it would be wrong to presume even prima-facie that the petitioners were party in hatching the conspiracy, or have entered into conspiracy with motive hatched earlier against the Bank. The transaction referred to by the complainant is advancement of loan to a Partnership firm running in the name and style of Shreeji Cold Storage. It is submitted

that the steps taken by both the petitioners are in the interest of the persons who have given power to them to act on behalf of the executant and if any mistake is committed in acting bonafide on behalf of the persons who had given Power of Attorney, it cannot be equated with any criminal role on either presumption or surmise, and therefore the proceedings initiated against both these petitioners should be terminated in the midst of investigation.

Mr. Gupta has relied upon the following decisions of the Hon'ble Supreme Court to substantiate his contention:-

1. State of Haryana and others Vs. Ch. Bhajan Lal and others, reported in AIR 1992 SC 604.

2. S.N. Palanitkar and others Vs. State of Bihar and another, reported in AIR 2001 SC 2960.

3. Ajay Mitra Vs. State of M.P and others, reported in (2003) 3 SCC 11.

Mr. B.B. Naik appearing for the complainant Bank, with a view to assist the prosecution, has taken me through the application praying for Police remand of both these petitioners and the contents of the order granting remand. It is submitted that this order of granting Police remand to both the petitioners, one of them is an Advocate, was challenged by way of Revision and the said Revision, after hearing the parties was dismissed. It is submitted by Mr. Naik that Police is smelling some criminal conspiracy in defrauding the bank and therefore, only the investigating agency was compelled to submit remand report and custodial interrogation. Mr. Naik submitted that it is rightly argued by Mr. Gupta that either rejection or grant of remand report would not have any bearing on the strength of prosecution on itself. In the same way, a detailed order granting bail in favour of the accused based on the evidence so far collected by the investigating agency by itself would not help the accused, especially when the investigation is half-way through and the Police is probing. When the Police is investigating the crime, then quashing of a proceeding i.e. complaint filed by the officer of the Bank is likely to hamper the investigation qua other accused persons and the same would have effect of terminating the Police investigation. If the investigation is in progress and or is moving in the correct direction, then termination of such proceedings would seriously prejudice the cause of the complainant bank. It is contended by

the bank that after entry of these two petitioners, the act done and steps taken by both these Power of Attorneys have created hurdles in securing bank's dues and bank is under an apprehension of incurring substantial financial loss.

It is not necessary to refer the details of the complaint or the inter-se disputes between the Partners or the allegations made by one group of partners against the other group of partners, but the fact remains that both the petitioners have impliedly accepted that they have entered into administration on the strength of the Power of Attorney executed in the year 2003. It is specifically contended that accused No.10 was dealing with the disputes inter-se and litigations in connection with the partnership firm, as he is admittedly an advocate. A bare reading of the Power of Attorney document conferring power would reveal that the same is `General' in nature. It is the allegation of the prosecuting agency and the respondent Bank that both these petitioners have created certain documents so that the properties of the partnership firm, namely Shreeji Cold Storage, or part thereof may look that they are either in possession, administration, management or control of a third person claiming status of a tenant. This act is done deliberately and to defeat the cause of the bank. The Police, at present, is investigating the matter to bring on record the correct facts and situation and the roles played by both the petitioners in creating right of such a third party/person and conferring such third person status of a tenant. It is not necessary to discuss at this stage what is the dishonest intention, or which act or omission on the part of the petitioners amounted to cheating or fraud.

When investigation under Section 156(3) of the Code of Criminal Procedure is pending and the allegations are apparently found to be false or it appears that no offence is made out, or prima-facie the complaint is found to be unsustainable on facts pleaded, the Court should be very slow in quashing the proceedings. In the decision of the apex Court in L.K. Advani, reported in 1997 (4) CRIMES page 1, the Hon'ble Court has inter-alia observed that: " the charges can be framed against an accused person only in those discerning few cases where the court comes to the conclusion that the prosecution has shown a prima facie case against the accused and there is evidence before the court which is capable of being converted into legal evidence later on during the subsequent proceedings after the framing of the charges. The matter with regard to the framing of the charges came

up for consideration in a catena of authorities wherein time and again it was observed that the prosecution must show a prima facie case against the accused in order to enable the court to frame a charge against him. If the evidence before the Court is of such type which if unrebutted and unchallenged by way of cross-examination would not be sufficient enough to convict the accused ultimately the the court would not be justified in framing the charge against the accused. The court at that stage is under no obligation to make an elaborate enquiry by sifting and weighting the material to find out a case against the accused beyond a reasonable doubt which it is required to do at the time of the final hearing. The Judge at that preliminary stage is simply required to find out that there was material which may lead to the inference that the accused has committed an offence. Thus, the charge can be framed by the court against the accused if the material placed before it raises a strong suspicion that the accused if the prosecution has sown the seed in the form of the incriminating material which has got the potential to develop itself into a full-fledged tree of conviction later on."

This observation of the apex Court if read in context to the facts of the present case, it is clear that the powers of this Court under Section 482 of the Criminal Procedure should be exercised sparingly and to prevent apparent injustice or misuse of process of the Court.

In the decision in State of Haryana and others Vs. Ch. Bhajan Lal and ors. (supra) the Hon'ble Supreme Court has recorded number of findings. The observations in paragraph 108 of the said decision can be said to be relevant for our purpose, but this decision would not help the present petitioners because there is no express legal bar in filing a prosecution against the accused who is a power of attorney and the prosecution has attempted to satisfy the Court that the steps taken by both the petitioners need to be examined. It has been observed that the power under Section 482 of Cr.P.C should be exercised sparingly and only where a criminal proceeding initiated against the petitioners are manifestly attended with malafide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused. It will be difficult even to conclude that the allegation in the complaint did not constitute a cognizable offence justifying registration of a criminal case. The police may, at the end of investigation, file a summary report

qua both these petitioners, or Police may charge-sheet both of these persons for any minor offences than alleged in the complaint. So the ratio of the decision in case of State of Haryana Vs. Bhajan Lal (supra) would not help the present petitioners.

In case of S.N. Palanitkar Vs. State of Bihar (supra) the Court exercised jurisdiction wherein the apex Court was dealing with an allegation that the complaint is filed without sufficient or cogent grounds. The apex Court has observed that the powers of the High Court under Section 482 of the Criminal Procedure Code is an inherent power available to prevent abuse of process of any Court or otherwise to secure ends of justice. The apex Court held that the High Court failed in exercising discretion when a manifest error committed by the Magistrate in issuing process against the accused person was required to be corrected. On facts the apex Court was satisfied that there was no scope for issuance of process by the learned Magistrate and even then the learned Magistrate issued the process, and that order was taken before the High Court. The High Court had refused to exercise jurisdiction vested with the Court under Section 482 of Cr.P.C. The issuance of process can be said to be an act of taking cognizance.

Here the Court has not taken any cognizance and the Police is asked to investigate the crime and undisputedly the investigation is in progress. Large sum of amount of a co-operative Bank is at stake and it is the allegation of the complainant that the entry of both these petitioners at a crucial stage requires to be examined and the investigating agency should be permitted to ascertain whether the entry of both the petitioners is because of the earlier contemplation or otherwise. So this decision also would not help the petitioners.

The decision of the apex Court in Ajay Mitra Vs. State of M.P. and ors (supra) also would not help the petitioners because it was a case where the complainant prima facie does not disclose commission of any cognizable offence against the accused. It was held that a guilty intention is an essential ingredient of the offence of cheating and "mens rea" on the part of the accused must be established. So unless the Court is able to reach to a conclusion that in the present case the complaint filed by the Bank does not disclose any commission of any cognizable offence against the accused, it would be difficult for the Court to say that the complaint is not sustainable and therefore the same

should be terminated even in the midst of investigation. In the present case prosecution has mainly relied on some oral and documentary evidence and it is submitted by the other side that certain documents produced by the petitioners themselves provide clue to the Police through which the investigation agency can reach to the conclusion whether the petitioners are involved in the conspiracy, or whether both or any of them can be said to be innocent, after having considered the case of the prosecution, status of both the petitioners, the nature of power of attorney executed in favour of the petitioners by the concerned Partners of the firm, who had undisputedly borrowed the loan from the complainant Bank and also one of the circumstances emerging from the record that one third person has claimed possession of part of immovable property owned by the partnership firm i.e. Shreeji Cold Storage.

While deciding one Criminal Revision Application arising out of an order passed in exercise of powers vested with the trial Court under Sections 227/228 of the Code of Criminal Procedure, this Court has observed that the Court can frame charge even when material indicates strong suspicion about complicity of accused. When this Court is called upon to exercise inherent powers and to quash the proceedings initiated by the complainant Bank, this Court is required to assess the material to find out if facts disclosed taken at face value contain ingredients of offence and if the answer is in affirmative, then all what offence or offences. So the adequacy of evidence collected by the Investigating agency or whether material can be said to be sufficient to proceed against the accused are material aspects which require consideration. This Court while dealing with the above Special Criminal Revision Application in case of Gopalsinh Vs. State, reported in 2003 (3) GLR 2656 has referred number of decisions of the apex Court. However, the observations made in case of State of M.P Vs. S.B Johari 2000(2) SCC 57 being more relevant, I would like to requote it:

"In our view, it is apparent that the entire approach of the High Court is illegal and erroneous. From the reasons recorded by the High Court, it appears that instead of considering the prima facie case, the High Court has appreciated and weighed the materials on record for coming to the conclusion that charge against the respondence could not have been framed. It is settled law that at the stage of framing the charge, the Court has to prima facie consider

whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. If the Court is satisfied that a prima-facie case is made out for proceeding further then a charge has to be framed. The charge can be quashed if the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by defence evidence, if any, cannot show that the accused committed the particular offence. In Niranjan Singh Karam Singh Punjabi Vs. Jitendra Bhimraj Bijjayya after considering the provisions of Sections 227 and 228 Cr.P.C., the Court posed a question, whether at the stage of framing the charge, the trial Court should marshal the materials on the record of the case as he would do on the conclusion of the trial. The Court held that at the stage of framing the charge inquiry must necessarily be limited to deciding if the facts emerging from such materials constitute the offence with which the accused could be charged. The Court may peruse the records for that limited purpose, but it is not required to marshal it with a view to decide the reliability thereof. The Court referred to earlier decisions in State of Bihar V. Ramesh Singh, Union of India V. Prafulla Kumar Samal and Supdt. & Ramembrancer of Legal Affairs, W.B Vs. Anil Kumar Bhunja and held thus:

From the above discussion it seems well settled that at the Sections 227 - 228 stage the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may for this limited purpose sift the evidence as it cannot be expected even at the initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case."

In the course of the argument advanced by the learned Public Prosecutor that the Police should be permitted to conclude the investigation and whether the petitioners or any of them can be said to be an accused

involved in the conspiracy or they have abetted the crime committed by the other accused persons, are the questions which can be replied effectively on conclusion of the investigation and filing of report by the Police under Section 173(2) of the Code of Criminal Procedure. If the investigating agency decides to drop the proceedings against the petitioners, then Police can also file report under Section 169 of the Criminal Procedure, or would file charge-sheet against the present petitioners, or any one of them. It will be too early to say that the criminal complaint against the present petitioners has been filed with ulterior motive or the same does not disclose any offence punishable under the Indian Penal Code mentioned in the complaint.

The powers of this Court under Section 482 of the Criminal Procedure should be exercised sparingly and to prevent apparent injustice or misuse of process of the Court. When none of these two elements is emerging apparently, then the Court should go very slow in exercising the powers vested with the Court and therefore, I am not inclined to accept the say of the petitioners.

The petition therefore deserves to be dismissed. It is however observed that it will be open for the accused or any of them to approach the competent Court after completion of investigation, seeking appropriate order, or to invoke jurisdiction of this Court afresh after conclusion of the trial. The observations made by this Court in the above order are tentative and based on the record pointed out to the Court, and shall not have any adverse effect on the petitioners.

(C.K. Buch, J.)
*/Mohandas